

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIE AUSTIN,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 260772

Wayne Circuit Court

LC No. 04-009963-01

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, cutting, breaking or tapping telephone lines, MCL 750.540, and malicious destruction of property worth more than \$200 but less than \$1,000, MCL 750.377a(1)(c)(i). Defendant was sentenced to 51 months to 20 years' imprisonment for his first-degree home invasion conviction, two to four years' imprisonment for his felonious assault conviction, one to two years' imprisonment for cutting, breaking or tapping telephone lines conviction, and six months to one year of imprisonment for his malicious destruction of property conviction. We affirm.

Defendant first argues on appeal that his guilty verdict for first-degree home invasion is against the great weight of the evidence. We disagree.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). To prove the offense of first-degree home invasion, the prosecution must show that: (1) the defendant broke and entered a dwelling or entered the dwelling without permission, (2) that when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).

The verdict was not against the great weight of the evidence because the evidence presented does not ponderate so heavily against the verdict that it would be a miscarriage of

justice to allow the verdict to stand. *Musser, supra* at 218-219. Testimony was presented showing that defendant entered Nichelle Brown's home without permission and, while inside, he assaulted Brown and Tony Smith. According to Brown, as of February 14, 2004, she was not in a relationship with defendant and he did not have permission to enter her home. Smith and Brown each testified that defendant "kicked" in Brown's front door and Officer John Mozak noticed extensive damage to Brown's door frame when he arrived at the scene. While defendant was inside of Brown's home he threatened Smith with a hammer. According to Smith, defendant "slammed the hammer like [defendant] was going to hit [him]" and defendant told him to "get out" of Brown's home. Testimony was also presented which showed that defendant hit Brown in the back of the neck with the hammer while inside of her house.

Although defendant testified that he believed that he still lived with Brown until the day in question and that his clothing and personal property were still at Brown's house, no evidence was presented to support this claim. Moreover, defendant's actions showed otherwise. When defendant entered Brown's home he did not enter with a key but, instead, he kicked in the door. Defendant's actions do not show that defendant believed that he had a right to be at Brown's home, and the trial court properly concluded the same. The trial court, as the fact-finder, weighed the credibility of the witnesses and determined that defendant was guilty of first-degree home invasion. "An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses." *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). The verdict was not against the great weight of the evidence, and therefore, defendant's claim lacks merit.

Defendant also argues that the prosecution presented insufficient evidence to sustain his first-degree home invasion conviction. We disagree.¹ This Court reviews de novo claims that the evidence was insufficient to support a conviction. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

Testimony was presented showing that defendant "kicked" in Brown's front door and entered her home with a hammer in his hand. The evidence also showed that defendant no longer lived with Brown and that he did not have permission to enter her home. While defendant was inside of Brown's home he threatened Smith with a hammer. There was also testimony that defendant hit Brown in the back of the neck with the hammer. This evidence was sufficient to establish the elements necessary to sustain defendant's conviction for first-degree home invasion. MCL 750.110a(2); *Sands, supra*, p 162.

¹ We note that defendant also argued that there was insufficient evidence to convict him of the "other charges of assault and destruction of property." However, because these claims of error were insufficiently briefed, we decline to address them. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

Finally, defendant contends that his trial counsel was ineffective for failing to argue that defendant had the right to be at Brown's house and, therefore, could not be guilty of first-degree home invasion. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).

To establish a claim of ineffective assistance of counsel a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). The defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

In his closing argument, defendant's trial counsel emphasized his belief that the prosecution failed to establish that defendant actually committed an assault or had the underlying intent necessary to convict defendant of first-degree home invasion. In addition, although he did not specifically argue that defendant had a landlord-tenant relationship with Brown or a legally enforceable right to be on the premises, defendant's trial counsel did note that defendant testified that he had a key to the home, had belongings at the home and believed that he had a right to be on the premises. Indeed, defendant's trial counsel actually argued that the trial court could consider lesser charges if it found that defendant did not have a right to be on the premises, but nevertheless concluded that the prosecution failed to prove that defendant committed or had the intent to commit an assault. Hence, defendant's trial counsel did in fact present a defense based on defendant's right to be on the premises. However, on this record, it appears that defendant's trial counsel elected to emphasize that the evidence tending to show that defendant committed or had the intent to commit an assault was insufficient. This choice was a matter of trial strategy and this Court will not "substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Therefore, we cannot conclude that defendant's trial counsel was ineffective on this basis.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto